IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 759 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

KESUBHA KATHADJI VADHER

Appearance:

MR ST MEHTA, APP for Appellant

MR JITEN M. BUDDHBHATTI for Respondent No. 11,13

CORAM : MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

Date of decision: 24/01/2000

ORAL JUDGEMENT : [Per: H.R. Shelat, J.]

1. The respondents, who were placed on trial relating to the offence punishable U/ss 302, 307, 324, 143, 148, 144 read with Sec. 149 of the Indian Penal Code and Secs. 161, 162 of the Gujarat Panchayat Act as well as Sec. 25(1)(a) of the Arms Act as well as Sec. 135(1)of the Bombay Police Act in the court of Sessions at Jamnagar came to be acquitted by the then Ld. Addl. Sessions Judge, Jamnagar, on 31st March, 1992. Being aggrieved by the order of acquittal, the State has preferred this Appeal challenging the legality and validity of the acquittal.

2. Necessary facts in short may be stated. Raghubha Tapuba and his bothers are having their agricultural lands admeasuring about 100 vighas. On 25th September, 1990 at 9.00 a.m. Raghubha Tapuba and his brothers were in the field in connection with agricultural operation. Khumansinh and Bahadursinh were ploughing the land while Raghuba was grazing the cattle in the nearby moorland. Znubha was putting disturbed hedge to order. In the nearby field Gulabsinh Giruba was doing his work. At that time, respondent No.2 had gone to that filed and had caused his cattle entered in the field of Raghuba Tapuba for the purpose of grazing. In that field, jowar crop was standing. He was asked to take his cattle back and Raghuba as well as his brothers were driving the cattle out of the field. At that time, rest of the respondents reached there with gun, axe, sphere, sword, stick, etc and they assaulted Raghuba and his brothers. Raghuba sustained injury on his head and as someone gave him the axe blow. The respondent No.11 was having a gun. He fired at Khumansinh Tapuba, as a result, he having sustained the bullet injury, succumbed the same at the spot. The respondent No.13 was also having a gun. He fired the same at Khumansinh Tapuba. He also sustained bullet injury and succumbed to the same at the spot. Danuba, Bhikhuba Takhubha, Gulabsinh Giruba, etc. hearing the uproar, reached the scene of incident. The respondents, who had caused death of above said two persons and injuries to three/four persons decamped. Thereafter, a complaint was lodged with Kalyanpur Police Station. The Police Officer, after the investigation was over, filed the charge sheet against all the respondents in the court of Judicial Magistrate, First Class at Kalyanpur. The learned Judicial Magistrate of that court, not competent to hear and decide the case relating to the offence punishable under Sections 302 and 307 of the Indian Penal Code, committed the case to the Court of Sessions at Jamnagar. The case then came to be registered as Sessions Case No. 6 of 1991, which was assigned to the then learned Addl. Sessions Judge,

Jamnagar, who framed the charge. The respondents pleaded not guilty and claimed to be tried. The prosecution led necessary evidence. Appreciating the evidence before him, the learned Addl. Sessions Judge reached the conclusion that the prosecution had failed to establish the charge beyond reasonable doubt. He therefore acquitted all the respondents. It is against that order of acquittal, the present Appeal is filed.

3. It may be stated that at the time of admission, the then learned APP Mr.Trivedi, in the facts and circumstances of the case, did not press this appeal, qua the respondents No. 1 to 10 and 12. The appeal was, therefore, dismissed at the admission stage qua these respondents and was admitted so far as it relates to respondents No. 11 and 13 are concerned. We have therefore to appreciate the evidence on record so far as the same relates to the respondents No. 11 and 13, who are alleged to have caused murder by firing.

4. Mr. S.T. Mehta, learned APP has taken us through the entire evidence as well as the judgment rendered by the lower court and contends that the learned Judge fell into the error in acquitting both the respondents No. 11 and 13. The gun shot injuries was proved by the evidence of the Doctor and there was no reason to discard the testimony of Raghuba Tapuba (Exh.40), Bahadursinh Tapuba (Exh.43), Gulabsinh Girubha (Exh.44), Kara Lakha (Exh.45) and Doctor's evidence (Exh. 65). He also draws our attention to the report of the Forensic Science Laboratory.

5. If the evidence pointed out by learned APP Mr. S.T. Mehta is accepted as it is on its face value without any comment, one would be inclined to hold that the learned Judge was not right in acquitting the respondents No. 11 and 13, but, when the evidence is perused with meticulous care and finicky details, several infirmities appear, the important one of which going to the root is required to be dealt with and it is qua the unexplained injuries found on the persons of Pratapsinh Karutha (Resp. No.5) Bharatsingh Bhikhubha Vadher (Res. No. 6), and Mahipatsinh (Res.No.7).

6. Dr. T.K. Vaghela (Exh.65) has in his evidence made it clear that the above said two injured respondents were brought before him by the police for necessary treatment because they had sustained injuries on forehead and head. He took stitches and treated them. What further appears from his evidence is that there were

bleeding injuries. He could also see the injury on right hand of respondent No.7. All these injuries were on the vital and visible part. Still however, the prosecution has not explained how those two respondents sustained injuries. It cannot be believed that the witnesses and complainant were unaware about the injuries and the prosecution was also not knowing about the defence that was taken. During the cross-examination of the Doctor, above said facts are brought on record and further while cross-examining Bahadursinh Tapuba (Exh.43), it is elicited that against him, Raghuba and Gulabsinh, a complaint relating to the injuries caused to Pratapsinh, Bharatsinh and Mahipatsinh lodged, was pending in the court at Kalyanpur. In view of the matter it was incumbent upon on the prosecution to explain how the above said three respondents sustained injuries. If the prosecution does not explain the visible and serious injuries sustained by the accused, what inference can be drawn, was the question posed before the Supreme Court in LAKSHMI SINGH vs. STATE OF BIHAR, AIR 1976 SC 2263, wherein it is held as under :

" In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and had thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

> There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

7. In the case on hand, the injuries are not explained and the prosecution has shrewdly remained silent. Hence, in view of the above said decision of the Supreme Court, it can be said that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version. The evidence of the prosecution is therefore not trustworthy and it can be said that the version in defence may be probable. The evidence led by the prosecution in this case therefore, cannot be relied upon as not reflecting the true version.

8. One more point also cannot be lost the sight of. At the scene of offence broken weapons, namely, gun, axe, stick, etc. were found. The prosecution ought to have explained in what circumstances the weapons were found in broken condition though especially when the story put up by the prosecution would show that there was no possibility of finding of the broken weapons. These circumstances also lead us to believe that the version of the prosecution witnesses is not the true version. Mr. Bhudhbhatti, learned Advocate, who readily accepted our proposal to assist the respondents is, therefore, right in contending that the prosecution has not come out with the true version and attempt to suppress the truth is made, by several improvements in the real story.

9. It is not necessary in view of the above facts to discuss the evidence of every witness and state how that witness is not reliable. Suffice it to say that we generally agree with the learned Judge and when that is so, it is not necessary to deal with all the points and re-state all those reasonings of the learned Judge.

10. For the aforesaid reasons, we do not think any justifiable reason to interfere with the findings and order of acquittal rendered by the learned Addl. Sessions Judge. The appeal, in view of such facts, fails and is hereby dismissed.

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